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No. 1103

# In the Supreme Court of the United States

OCTOBER TERM, 1945

GEORGE WILLIAM DODEZ, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the circuit court of appeals (R. 189–200) is not yet reported.

### JURISDICTION

The judgment of the circuit court of appeals was entered March 18, 1946 (R. 189). The petition for a writ of certiorari was filed April 12, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.[1]

[1] The petition was filed less than 30 calendar days after the judgment of the circuit court of appeals and is therefore

### QUESTION PRESENTED

The principal question presented is whether petitioner, a Jehovah's Witness who had claimed classification as a minister of religion and who was classified as a conscientious objector, was illegally so classified by his board of appeal.

### STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act and of the Selective Service Regulations are set forth in the Appendix, *infra*, pp. 26–32.

### STATEMENT

Petitioner was indicted (R. 2–3) in the United States District Court for the Northern District of Ohio in one count charging a violation of Section 11 of the Selective Training and Service Act of 1940. The indictment alleged that pursuant to petitioner's claim that he was a conscientious objector, he was classified in IV–E and ordered to report on April 21, 1944, for work of national importance, and that he knowingly failed to do so. He was convicted after a jury trial (R. 112) and was sentenced to imprisonment for five years (R. 130–131). Upon appeal to the Circuit Court of Appeals for the Sixth Circuit, the judgment was affirmed (R. 189).

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timely whether governed by Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934, or by Rules 37 (b) (2) and 45 (a) of the new Rules of Criminal Procedure, effective March 21, 1946.

It was undisputed at the trial that petitioner was finally classified in IV-E by his board of appeal; that he thereafter reported for a pre-induction physical examination and was found acceptable for service; that the local board thereafter ordered petitioner to report on April 21, 1944, for work of national importance; and that petitioner willfully refused to comply with the order of his local board (R. 13–15, 56–57). The sole disputed issue concerned the legality of the administrative proceedings in which petitioner's claim to classification as a minister of religion in the Jehovah's Witnesses sect was rejected and his claim to classification as a conscientious objector was granted. The relevant facts, as reflected by petitioner's selective service file, which was received in evidence (R. 15, 17),[2] may be summarized as follows:

Having registered on June 30, 1942, with Local Board No. 2, Wayne County, Ohio (R. 13, 156), petitioner, on September 21, 1942, filed his selective service questionnaire (R. 146–150), in which he stated that he was 20 years of age; that he had a high school education; that since Jan-

[2] While the entire selective service files was received in evidence, the printed record before the Court includes only some of the documents in that file. In order that documents in the file which we believe are relevant and which are not printed in the record may be considered by the Court, we have lodged with the Clerk the same photostatic copies of all the documents in the file which were before the court below (see R. 144–145).

uary 1941, he had been affiliated with the Watchtower Bible and Tract Society; that he was an ordained minister of religion with "1¾ years experience in this kind of work"; that he was also a farmer from 1938 to 1942; that he was conscientiously opposed to all war; and that he believed he was entitled to a IV–D classification, as a minister of religion.

On September 26, 1942, petitioner filed a special form for conscientious objectors (R. 150–154), in which he stated that he was opposed by reason of religious training and belief to both combatant and noncombatant military service; that he believed in the use of "force in the fight for righteousness" but that "if one is going to be a Christian he must not take part in the affairs of this world because the world is against Christ's Kingdom"; that since January 1941 he gave expression to his religious beliefs by "witnessing at every opportunity from house to house and on the street and elsewhere"; and that the Jehovah's Witnesses organization has "No creed or official statements—each person must make his own choice and take his own stand for the New World."

Petitioner also filed with the local board an affidavit (R. 160–162) in which he said that he had been a member of Jehovah's Witnesses since July 1941; that since May 6, 1942, he had been a pioneer in the sect, which occupied "the greater

amount of my time"; that "the duties that I perform as a pioneer is to go from house to house and preach the gospel of the Kingdom and declare the day of vengeance of Jehovah, to comfort all that mourn, place literature and assist interested parties in gaining knowledge of the truth"; and that he had been commissioned by the Watch Tower Bible and Tract Society "to preach the gospel of God's kingdom." Petitioner's claim was supported by affidavits of other persons and by documents purporting to show that he was an ordained minister of religion (R. 157–160, 163–165).

On October 26, 1942, the local board by a vote of 4 to 0 classified petitioner I–A, as available for military service, with a notation in its minutes, "Selling Jehovah Witness Literature at Public Square" (R. 149). On November 25, 1942, the local board reaffirmed the I–A classification with the notation in its minutes, "not an ordained minister as per public recognitio" (R. 150). Petitioner then requested a personal appearance before the local board (R. 167–168) and the minutes of the board reveal that on December 7, 1942, a hearing was had, and that after reconsidering the case, the board again reaffirmed the I–A classification (R. 150). Petitioner's request for a second hearing was denied (see R. 169), and on December 17, 1942, he appealed to the board of appeal (R. 149). As permitted by

Selective Service Regulation 627.12,[3] petitioner included in his notice of appeal (R. 170–171) a summary of the facts concerning his hearing before the local board on December 7, 1942, and his efforts to secure a second hearing; he urged that he be classified IV-D because "all the facts in my file and case show that I have been a regular minister of religion since May 7, 1942, prior to my registration of June 30, 1942," and because the local board acted capriciously and with prejudice in classifying him I–A.

While the case was pending on appeal before the board of appeal, petitioner submitted information to the local board to the effect that on January 21, 1943, he became "the head of the entire Wooster [Ohio] Company [of Jehovah's Witnesses], that is head of a congregation," and requested that the local board reconsider his classification (R. 173). It appears from correspondence dated May 7, 10, and 12, 1943, (see fn. 2, *supra*), that all of this material was forwarded

[3] This Section provides:

"The person appealing may attach to his notice of appeal or to the Selective Service Questionnaire (Form 40) a statement specifying the respects in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file."

to the board of appeal for consideration by it in classifying petitioner.

In the meantime, a Department of Justice hearing officer conducted a hearing into petitioner's claim that he was a conscientious objector, and the Federal Bureau of Investigation investigated the claim.[4] The Department recommended that petitioner be classified as a conscientious objector, and on June 4, 1943, the board of appeal so classified petitioner. More than seven months later, on January 15, 1944, petitioner again submitted to the local board additional evidence purportedly "proving my status as an Ordained Minister," and he requested that his classification be reopened (R. 179–180). It appears from a letter dated February 10, 1944, contained in the selective service file, that the local board reviewed the information submitted and concluded that it did not warrant reopening the classification.

At petitioner's request[5] his selective service file was reviewed by National Headquarters of the Selective Service System, and it was "determined

[4] In the course of the investigation, an F. B. I. agent interviewed petitioner's father-in-law, who told him that petitioner devoted five hours a day to his Jehovah's Witness activity and that he devoted the remainder of his time to assisting his father-in-law in operating a 500 acre farm and in "custom threshing" and "going from farm to farm threshing for other farmers" (see p. 5 of the hearing officer's report, which is contained in the selective service file).

[5] See his letter in the selective service file of February 18, 1944.

that the record does not contain any evidence which would justify National Headquarters in interfering with the classification of the registrant."[a]

It was at this juncture of the administrative proceedings that petitioner was physically examined and found acceptable for service and was ordered to report for work of national importance, in lieu of military service (*supra*, p. 3).

In addition to the documentary evidence summarized above, the trial court permitted petitioner to adduce *de novo* evidence calculated to show that as of the time of the trial he was a minister of religion. Mrs. Sauer testified that the Jehovah's Witnesses organization in Wooster, Ohio, had no membership as such, but that she was affiliated with the Jehovah's Witnesses (R. 23); and that she had signed a document stating that she recognized petitioner as a minister of religion who preaches and teaches the principles of the Watchtower Bible and Tract Society, Inc. (R. 22, 158). On cross-examination she testified that she was a Jehovah's Witness, but that she was not a minister of religion (R. 25).

Petitioner testified on direct examination that at the time that he registered under the Selective Training and Service Act and thereafter, he "was a duly ordained minister of the Gospel, preaching the Gospel of the Kingdom only" (R. 26).

[a] See the letter in the file of August 9, 1943, from State Headquarters to the local board.

He said that he relied upon the Scriptures for his ordination and that his ministerial status commenced in January 1941, when he received an identification card from a representative of the Watchtower Society which, as he testified, stated that anyone possessing such a card is a minister of religion. (R. 28–29). Petitioner testified that after receiving the card he "began to preach the Gospel of the Kingdom in accordance with the regulations stated by the Watchtower Society" by preaching "the Gospel of the Kingdom from house to house, in territory that I am definitely assigned" (R. 29); "I call on each individual in that territory, and present to them the Message of the Kingdom. Those who are interested, a call is made at a later date, and a Bible study is arranged in their home" (R. 29). Petitioner said that in addition he conducts funeral and baptismal services, delivers sermons, looks after the congregation, sees that the bills of the church are properly taken care of, and that someone takes care of cleaning the church building (R. 30).

Petitioner described the course of study which he pursued to become a minister as follows (R. 48, 49):[1]

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[1] Petitioner also offered to prove (R. 50–51) that he studied:

"Non-Theocratic references; parts of speech; history of the Bible; the use of pronouns; the use of verbs; features of 'The Emphatic Diaglott'; arguments; impromptu speaking; advantages of exhaustive concordances; Theocratic tactfulness."

The course that I have studied, that I pursued to become a minister, consisted of many different subjects, such as: Gathering material for a sermon; how to use different Bible helps; the use of the Watchtower Bible helps in particular; need of an outline for a sermon; the construction of a sermon; then the delivery of a sermon, and the different methods of delivering a sermon; extempore speaking; how to use Concordances; the introduction of a sermon; developing the body of a sermon; different types of conclusions for a sermon—

* * * * *

The last one, I believe, was different types of conclusions for a sermon. The oral emphasis in a sermon; gestures in delivering a sermon; use of the dictionary, and use of a Bible dictionary, and choice of words in a composition of a sermon; building a vocabulary; reasons for different Bible translations; sentence construction of a sermon; the variety of sentence construction in a sermon; God's Word on vital subjects that are contained in the Bible; need for argumentation; argumentation in a sermon; the evidence in argumentation; Watchtower Bible "Proper Names"; "Proper Names"; audience fear; modulation; poise; construction; how to study the "Watchtower"; refutation; coherence; non-Theocratic references; parts of speech;—

On cross-examination petitioner testified that 102 persons are associated with the Jehovah's

Witnesses in Wooster, and that each possesses an identification card which is the same as his, and that each is therefore a minister (R. 52–54). Thereafter, on redirect examination he explained that these persons are not ministers in the same sense that he is (R. 57, 60); that he is the "managing agent" for the Watchtower organization in Wooster (R. 63).

In submitting the case to the jury, the trial judge instructed them that the Selective Training and Service Act provides that the decisions of the local boards shall be final, except where an appeal is taken (R. 105). The jury was further instructed (R. 107) that they should find petitioner guilty if they found that he was a male person who had registered under the Act and who knowingly failed to report for work of national importance in accordance with an order of his local board. (See also R. 108–109, 110).

## ARGUMENT

The Circuit Court of Appeals for the Sixth Circuit, after analyzing the decisions of this Court in *Falbo* v. *United States*, 320 U. S. 549, and *Estep* v. *United States*, Nos. 66 and 292, decided February 4, 1946, concluded that petitioner is in exactly the same position as was Falbo, and that he therefore was not entitled to challenge the legality of his selective service classification in this criminal prosecution (R. 191–194). Notwithstanding this fact, the court below carefully

examined petitioner's selective service file and the other evidence adduced or offered at the trial bearing on the legality of the classification, and concluded that petitioner tendered nothing which, under the scope of review defined by the *Estep* decision, showed that his classification is in any respect illegal (R. 194–200).

1. Petitioner's principal contention (Pet. 11-20) is that the court below erred in its application of the *Falbo* decision to this case. Adopting the view which the Government urged before this Court in *Gibson* v. *United States*, No. 221, this Term, which is now pending for re-argument, petitioner urges that in January 1944, after the *Falbo* decision, the selective service procedure for the assignment of registrants classified IV-E to Civilian Public Service Camps was amended and, as a result, the final determination of acceptability now is made at a point in the process before the registrant is ordered to report for work of national importance. Since he was finally accepted for service, petitioner argues that he is entitled to challenge his classification in the criminal trial, even though he did not comply with the order to report for work of national importance.[8]

[8] One of the petitioner's counsel of record was also counsel for the petitioner in the *Gibson* case. In that case, which is governed by the same administrative procedure applicable to this case, Gibson's counsel urged in his brief, pp. 17–19, that it was necessary for a registrant assigned to a Civilian

We adhere to our position in the *Gibson* case and, thus, agree with petitioner in this aspect of the case. As we pointed out in our brief in the *Gibson* case (pp. 13–17, 53–58), after a registrant is classified IV–E, he is ordered to report for a physical examination (Reg. 629.1-629.2). If he is found to be fit for work of national importance, he is issued a certificate of fitness, which constitutes the final administrative determination of his acceptability (Reg. 629.32). Thereafter, he is assigned to a Civilian Public Service Camp by the Director of Selective Service, and the local board thereupon issues its order to report for work of national importance (Reg. 652.11). As soon as the registrant leaves his local board en

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Public Service Camp "to report at the camp and undergo the physical examination given by the camp in order to finalize and complete his acceptance at the camp under the Act and regulations." At page 19, counsel concluded that since acceptance under the Regulations as they exist now cannot be finalized until the registrant reports at the camp and undergoes the physical examination, under the doctrine of the *Falbo* decision, Gibson could not have exhausted his remedies until he had been accepted at the camp. If this view is correct, petitioner, by failing to report to the camp, neglected to exhaust the administrative process, and under the *Falbo* decision he is not entitled to challenge his classification in the criminal trial.

Registrants classified for military service are given a second physical examination at the induction station after they have responded to the induction order. Hence, in their cases, their administrative remedies have not been exhausted until they are found acceptable at the induction station. See Brief for the United States, p. 14, in the *Smith* case, No. 66, this Term.

route to the camp, he is "under the jurisdiction of the camp to which he is assigned" (Reg. 652.13). Every registrant who reports to the camp to which he is assigned is accepted by the camp director; since February 1944 the camp director has possessed no authority to reject a registrant (Reg. 653.11).

It is in the latter respect that the procedure differs from that which prevailed at the time of *Falbo's* case. At that time, it was possible for a registrant to be rejected upon examination at the camp (320 U. S. at 553), and the administrative process thus was not exhausted until the registrant was physically examined at the camp and was found acceptable.

The court below evidently was not aware of the fact that the selective service procedure was changed subsequent to the *Falbo* decision, for it held (R. 194), relying upon the procedure described in the *Falbo* opinion, that petitioner had not exhausted his administrative remedies because he did not report to the camp to which he was assigned and that he therefore was in the same position as Falbo. However, petitioner did complete every step in the process short of reporting to the camp; he reported for physical examination and was issued a certificate of fitness (R. 51), which was the final determination of petitioner's acceptability. In these circumstances, if our view of the selective service procedure is correct, peti-

tioner had exhausted his administrative remedies. Accordingly, we think that he is entitled in the criminal proceeding to challenge his selective service classification to the extent permitted by this Court's decision in the *Estep* case.

2. Our view as to petitioner's right to challenge his classification does not require that he be given a new trial. For, as we have shown, the trial judge permitted petitioner to introduce into evidence his selective service file, as well as independent testimony concerning the events before the selective service boards, and to make full offers of proof as to all evidence which was excluded, and the court below held that nothing which petitioner aduced or offered to prove supports his contention that he was illegally classified.

We think that two major defects permeate petitioner's theory of defense in the trial court and that, as a result, petitioner neither proved nor offered to prove any facts which would show that he was not finally classified in conformity with the Selective Service Regulations or that there is no basis in fact for his classification. (See *Estep* v. *United States*, slip opinion, pp. 6–7.)

a. Consistently with the practice of Jehovah's Witnesses in other cases, petitioner defended against the indictment by seeking to show *de novo* that he is, in fact, a minister of religion and is thus exempt from service under the Selective Training and Service Act. As we have shown in

the Statement, *supra*, pp. 8–11, he adduced evidence showing his alleged preparation for the ministry and showing his day to day activities as of the time of the trial, which were believed to show that he was a regularly practicing minister of religion. Much of the evidence in this respect was evidence which was not presented to the selective service boards and was, of course, not considered by them in classifying petitioner. We think this evidence was improperly received and that under no tenable theory could it be a defense to the indictment.

The issue in the criminal trial was not whether petitioner is a minister of religion. For that is a question the determination of which is lodged exclusively in the Selective Service System; section 10 (a) (2) of the Selective Training and Service Act specifically provides that the selective service boards shall have power to hear and determine "all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act," and it provides that the decisions of the selective service boards shall be "final." As this Court pointed out in the *Estep* decision (slip opinion, pp. 6–7), "The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are

not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant." Thus, the issue in the trial court was whether petitioner was classified in conformity with the selective service regulations or, as this Court stated in the *Estep* case, whether the selective service agencies exceeded their jurisdiction in classifying petitioner.

In support of such a defense, we think petitioner was entitled to attempt to show that on the evidence before the selective service boards there was no basis in fact for refusing to classify him as a minister of religion, or that the final classification upon which the induction order was predicated was not made in conformity with the Selective Service Regulations, either because he was denied an opportunity to adduce evidence, because the final classifying board acted arbitrarily or with prejudice, or because of some similar defect of substance. Petitioner's *de novo* evidence, which he adduced or offered at the trial, could not under any theory be probative on these issues. Certainly, evidence of what petitioner was doing many months after he was finally classified does not show that the classifying board acted in the

teeth of the regulations or the evidence before it. Nor would evidence of his activities before or at the time he was classified, which was not submitted to the Selective Service boards, show illegal action by the classifying board. In our view, the final classification must be tested solely on the administrative record, with the exception that a registrant may show procedural irregularities by going outside the record. A classifying board, we think, cannot be charged with arbitrariness because there may have been evidence which supported the registrant's position, but which was not seasonably presented to the board, although there was opportunity for doing so. Accordingly, we submit that petitioner's evidence concerning his asserted ministerial status, which was adduced initially at the trial, is not relevant to the issue presented by the case.

b. The second major defect in petitioner's theory of defense in the trial court is that, to a large extent, his proof was directed to a superseded classification—the I-A classification given him by his local board. As we have shown in the Statement, *supra*, pp. 5-7, petitioner was classified I-A by his local board and thereafter he appealed to the board of appeal, specifying the errors which he believed the local board committed. The board of appeal, after securing the recommendation of the Department of Justice, classified petitioner IV-E, and it was upon the

basis of this classification that petitioner was ordered to report for work of national importance. If the local board's I–A classification had stood, petitioner, of course, would have been ordered to report for induction into the armed forces.

We think it is plain that to show illegality in the order to report for work of national importance petitioner was obliged to demonstrate that the classification given him by the board of appeal was illegal, for that was the final classification. It obviously proves nothing to show, as petitioner sought to do (see Pet. 9, 20), that the I–A classification by the local board was illegal; that classification was rejected by the board of appeal and did not have any operative effect other than to furnish petitioner an opportunity to take his case before the board of appeal.

In his effort to show only that his local board was prejudiced against him and had arbitrarily classified him I–A, petitioner offered to prove that after he was classified I–A, he requested a personal appearance before the local board; that on December 7, 1942, he appeared before the board to "point out to you information in my file proving that I am entitled to a minister's classification of IV–D" (R. 33) and to present additional evidence (R. 34); and that he was briefly interrogated and then was told, "We have other registrants to consider tonight, and you can leave

that material here, and we will look it over later tonight" (R. 34). Petitioner further offered to prove (R. 34–37) that thereafter he separately interviewed the various members of the local board at their homes and places of business and that each indicated prejudice against him.

We agree with the circuit court of appeals (R. 198–200) that petitioner had the kind of hearing to which he was entitled. While the hearing may have been brief, in view of the press of other business before the local board, petioner admitted that he was afforded the opportunity to furnish any evidence which he desired to submit, and that he was assured that it would be considered by the local board. But, as we have argued, there is no occasion to consider whether the hearing was adequate, for petitioner's final classification rests upon the action of the board of appeal. Petitioner offered nothing even tending to show that he was deprived of an opportunity of placing all his evidence before that board or that the board of appeal acted otherwise than according to law in classifying him. Indeed, the summary of his selective service file, *supra*, pp. 6–7, shows that new evidence which he furnished the local board after he had taken his appeal was submitted to the appeal board and so far as appears was considered by it in classifying him IV-E. In these circumstances, we

think this aspect of the case is controlled by the decision of this Court in *Bowles* v. *United States*, 319 U. S. 33, in which the Court concluded that a registrant's asserted defense, in a criminal prosecuting for failing to report for induction, that his board of appeal had erroneously construed the act, was not a valid defense because that board's classification was superseded by the classification given the registrant by the Director of Selective Service. To the same effect, Mr. Justice Rutledge, concurring in *Falbo* v. *United States*, 320 U. S. 549, 555, said:

> * * * Petitioner claims the local board's order of classification was invalid because that board refused to classify petitioner as a minister on the basis of an antipathy to the religious sect of which he is a member. And, if the question were open, the record discloses that some evidence tendered to sustain this charge was excluded in the trial court. But petitioner has made no such charge concerning the action of the appeal board which reviewed and affirmed the local board's order. And there is nothing to show that the appeal board acted otherwise than according to law. If therefore the local board's order was invalid originally for the reason claimed, as to which I express no opinion, whatever defect may have existed was cured by the appeal board's action. * * *

3. Petitioner also offered to prove (R. 37–40) that after he was classified IV–E by the board of appeal, he talked to a government appeal agent and to various members of the local board concerning the possibility of reopening his classification, and that these persons indicated an unwillingness to change his classification. On the other hand, he also offered to prove that one member of the local board said the board would reopen his case "if new and sufficient evidence is presented" (R. 40). Petitioner offered to prove that thereafter, on January 15, 1944, he submitted "additional evidence proving my status as an ordained minister, and asked that my case be reopened" (R. 41). The selective service file, which is in evidence, shows that the local board reviewed the evidence submitted and concluded that it did not warrant reopening the classification (see *supra*, p. 7).

Section 626.2 of the Selective Service Regulations (*infra*, p. 29) provides, *inter alia*, that a local board "may," at any time prior to the issuance of an order to report for induction or for work of national importance, reopen the classification of a registrant upon his request, "if such request is accompanied by written information presenting facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification." Since the local board possessed jurisdiction to do this after the decision of the board of appeal, we do

not rely upon the *Bowles* decision in connection with this aspect of the case. We do urge, however, that the offer of proof, when viewed in the light of the facts shown by the selective service file, tendered nothing showing that the local board acted illegally under the Regulations in refusing to reopen the classification.

Assuming, as petitioner offered to prove, that some members of the local board, when interviewed at their homes individually, indicated a reluctance to change petitioner's classification, the fact remains that when petitioner's application to reopen his classification was submitted to the board together with his "additional evidence," the board considered it and declined to reopen, because the additional evidence did not warrant it. Petitioner tendered no evidence showing that the board acted otherwise than according to law in dealing with his application to reopen the classification. Moreover, whether a classification shall be reopened is a matter within the discretion of the local board; the board "may" reopen under circumstances prescribed by Section 626.2 of the regulations. In this case, the selective service file shows that the board, exercising the discretion lodged in it by Section 626.2, declined to reopen because the additional evidence did not warrant it. So far as appears, the board honestly exercised its discretion. That is all that the regulations require of it.

4. Petitioner urges (Pet. 11–12) as a reason for granting the writ that this case presents a question "similar" to that presented in *Gibson* v. *United States*, No. 221, this Term. We think that this case bears the same resemblance to the *Gibson* case as do the *Falbo, Smith,* and *Estep* cases, in that they all involve questions of judicial review in prosecutions for failure to perform a duty required by the Selective Training and Service Act. However, this case, like the *Falbo, Smith,* and *Estep* cases, does not present the basic question involved in the *Gibson* case, whether acceptance of a registrant at a Civilian Public Service Camp bars the defense of illegal classification in a prosecution for desertion. Petitioner did not report to the camp and was never accepted by the camp director; hence, it is plain that this case does not present that question.

## CONCLUSION

We agree with petitioner that he was entitled to challenge the legality of his classification in the criminal trial. However, he was afforded ample opportunity to show any illegality inhering in his classification, and, as the circuit court of appeals held, nothing in the selective service file or in the other evidence which he adduced or offered supports his present claim that his final classification was illegal. In these circumstances, petitioner tendered no issue concerning his classi-

fication for determination by either the jury or the trial judge, and he was therefore properly convicted. Accordingly, we respectfully submit that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
*Solicitor General.*
THERON L. CAUDLE,
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APRIL 1946.

## APPENDIX

The Selective Training and Service Act of 1940, as amended, 54 Stat. 885 (50 U. S. C. App. 301 et seq.) provided, in part, as follows:

SEC. 5 * * *

(d) Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act.

* * * * * *

SEC. 10 (a) * * *

* * * * *

(2) * * * Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulation as the President may prescribed. * * *

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SEC. 11. Any person * * * who in any manner shall knowingly fail or neglect

to perform any duty required of him under or in execution of this Act, or rules or regulations made pursuant to this Act * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *.

The applicable selective service regulations in effect when petitioner was classified provided as follows:

622.44 *Class IV–D: Minister of religion or divinity student.*—(a) In Class IV–D shall be placed any registrant who is a regular or duly ordained minister of religion or who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than 1 year prior to the date of enactment of the Selective Service Training and Service Act (September 16, 1940).

* * * * *

(c) A "duly ordained minister of religion" is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties. (6 F. R. 6607.)

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622.51 *Class IV–E: Conscientious objector available for, assigned to, or released from work of national importance.*—(a) In Class IV–E shall be placed every registrant who would have been classified in

Class I–A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to both combatant and noncombatant military service. (7 F. R. 6517.)

(b) Upon being advised by the Director of Selective Service that a registrant who was inducted into the land or naval forces for military service will be discharged because of conscientious objections which make him unadaptable to military service, the local board shall change such registrant's classification and place him in Class IV–E. The Director of Selective Service shall assign such registrant to work of national importance under civilian direction.

* * * * * *

626.2. *When registrant's classification may be reopened and considered anew.*—(a) The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any interested party in a case involving occupational deferrment, if such request is accompanied by written information presenting facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order

to Report for Induction (Form 150) unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant has no control.

(b) At any time before the induction of a registrant, the local board shall reopen and consider anew such registrant's classification upon the written request of the State Director of Selective Service or the Director of Selective Service. (7 F. R. 110, 653, 2089.)

629.1 *Who will be examined.*—(a) Every registrant, before he is ordered to report for induction, shall be given a preinduction physical examination under the provisions of this part unless (1) he signs a Request for Immediate Induction (Form 219) or (2) he is a deliquent, * * * (9 F. R. 440.)

629.2 *Ordered to report for preinduction physical examination.*—(a) In accordance with instructions of the Director of Selective Service, the State Director of Selective Service will issue to each local board a Call—Preinduction Physical Examination (Form 224)—specifying thereon the number of registrants to be delivered for preinduction physical examination and the time and place fixed for such delivery.

(b) The local board shall mail an Order to Report—Preinduction Physical Examination (Form 215) to a sufficient number of registrants who have been classified in Class I–A or Class I–A–O under the provisions of section 623.21 to fill each Call—Preinduction Physical Examination (Form 224) which it receives. In filling such calls, the local board, as far as practicable, shall first select volunteers, then nonfathers, and

finally fathers, and within each group shall make such selections in sequence of order numbers without regard to whether the registrant has requested or will request a personal appearance before the local board and without regard to whether an appeal has been or will be taken.

(c) The local board shall also mail an Order to Report—Preinduction Physical Examination (Form 215) to each registrant classified in Class IV–E when his order number is reached (without regard to whether he has requested or will request a personal appearance before the local board and without regard to whether an appeal has been or will be taken) in the process of ordering Class I–A and Class I–A–O registrants to report for preinduction physical examination under the provisions of paragraph (b) of this section.

(d) The local board may also mail an Order to Report—Preinduction Physical Examination (Form 215) to any registrant (1) who is classified in a class other than Class I–A, Class I–A–O, or Class IV–E, if it determines that his induction will shortly occur, or (2) when directed to do so by the Director of Selective Service or the State Director of Selective Service.

(e) At the time the local board prepares the original Order to Report—Preinduction Physical Examination (Form 215), it shall make a copy of such form and shall file the copy in the registrant's Cover Sheet (Form 53). (9 F. R. 440, 1415.)

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629.32 *Mailing Certificate of Fitness to registrant accepted or rejected.*—When a Certificate of Fitness (Form 218) indicates that a registrant has been accepted for the

Army or the Navy or that a registrant has been rejected, the local board shall immediately mail the original of such certificate to the registrant and shall record the date of mailing of such Certificate of Fitness (Form 218) on the registrant's Selective Service Questionnaire (Form 40). (9 F. R. 1415.)

* * * * *

652.13 *Jurisdiction of local board while registrant is engaged in work of national importance.*—A registrant in Class IV–E who has reported for work of national importance pursuant to this part shall be retained in Class IV–E by the local board. Such registrant after he has left the local board in accordance with section 652.12 for work of national importance under civilian direction is under the jurisdiction of the camp to which he is assigned. The local board shall take no further steps with regard to such registrant without instructions from the Director of Selective Service but should report any information to the Director of Selective Service which might affect the registrant's status. (7 F. R. 111.)

* * * * *

653.11 *Reception at camps.*—(a) When the assignee has reported to camp, the camp director shall complete the Order to Report for Work of National Importance (Form 50). Four copies of the completed Order to Report for Work of National Importance (Form 50) shall be sent to the Director of Selective Service; one copy will be retained by the camp director. The Director of Selective Service will forward two copies of the Order to Report for Work of

National Importance (Form 50) to the appropriate State Director of Selective Service, who will retain one copy for his files and mail the other copy to the local board for filing in the registrant's Cover Sheet (Form 53).

(b) As soon as possible after the assignee has reported to camp, the camp physician shall give him a physical examination and shall determine whether there has been any change in the assignee's physical or mental condition since his preinduction physical examination. If a camp physician is not available, the camp director, to the extent that he is capable of doing so, shall, by observing and questioning the assignee, make such determination. The camp physician or the camp director, as the case may be, shall, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), make a record of such determination.

(c) Irrespective of the determination which is made as a result of the examination of an assignee made under the provisions of paragraph (b) of this section, the camp director shall, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), place a statement that a registrant is accepted for work of national importance at the civilian public service camp to which the registrant has been assigned. The statement shall specify the date and place of such acceptance and shall be signed by the camp director who shall retain the First Copy of the Report of Physical Examination and Induc-

tion (Form 221) and shall forward the Original to the Director of Selective Service.

(d) Upon receiving notice that a registrant has been accepted for work of national importance, the local board shall not change his classification but shall note the fact of his acceptance for such work in the Classification Record (Form 100). (9 F. R. 1416, 6207.)

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